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No. 09-227

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

RICHARD MYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

While conceding that "Torture is illegal under federal law, and the United States government repudiates it" (Opp'n at 11), even now the Solicitor General stops short of acknowledging that torture directed, approved and implemented by officials of the United States is so repugnant that it also violates fundamental rights; no less so when hidden from public view at Guantánamo Bay. Respondents appear willing to let the final word on torture and religious abuse at Guantánamo be that government officials can torture and abuse with impunity and will be immune from liability for doing so. Yet whether United States officials are free to engage in despicable acts in a place wholly controlled by the United States is the pre-eminent constitutional issue of our time, and it is squarely presented to this Court for decision in this case.

The issues Respondents choose to address are no less important for this Court to decide. Respondents' defense of qualified immunity, for instance, is raised in utter bad faith. It reflects a cynical attempt by Respondents to create and take advantage of purported ambiguity about whether the rule of law applies at Guantánamo, gambling that they could not be held to account. Respondents ask the Court to read out of the doctrine the good faith component from which qualified immunity is derived, and ignore this Court's jurisprudence regarding the sequence for examining issues of qualified immunity in constitutional torts. In addition, Respondents attempt to employ a vague formulation of "special factors" to carve out an exception for constitutional tort liability in the most egregious cases. *Id.*

I. THE ALTERNATIVE DISPOSITION BELOW ON *BIVENS* "SPECIAL FACTORS" GROUNDS WAS ALSO WRONG AND IS NOT A REASON TO DENY CERTIORARI.

It is telling that the opposition leads with an argument concerning a point that the circuit court buried in its penultimate footnote. In its footnote, the circuit court cited, as an "alternative" ground for dismissal of the *Bivens* claim, the possibility that "special factors" would preclude recognition of such a claim in these circumstances. (April 24, 2009, Op. at 10 n.5.) This cryptic statement, which addresses the existence of the rights at issue, is a foundation question that is fairly included in the questions presented. S. Ct. Rule 14(1)(a). Petitioners are prepared to brief fully on the merits why the decision below on the alternative "special factors" ground is also untenable.

The circuit court referred to what it broadly described as the "danger of obstructing U.S. national security policy" (Op. at 10 n.5), but it made no attempt to evaluate whether that factor affects the *Bivens* claim in the instant case. Instead, it simply likened the circumstances here to those that it found existed in its earlier case, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). In Respondents' opposition, the special factors argument is further diluted to become a banal submission that new causes of action under *Bivens* should not be recognized "in sensitive circumstances such as these." (Opp'n at 11.)

Given the paucity of attention paid to the "special factors" issue by the court below, Petitioners did not specifically present this as an independent issue for

certiorari.[1] However, since Respondents grasp at the "special factors" footnote in their attempt to avoid consideration of the principal issues, we would make clear that there are no special factors here, and that reliance on special factors in the fact setting of this case is in clear conflict with this Court's precedents.

Special factors have previously been found only where there are elaborate procedural remedies already available to plaintiffs, where there was a particular risk to the public treasury in implying a remedy under *Bivens,* or where the tort goes to a core foreign or military policymaking function. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 151-52 (1992); *Bush v. Lucas*, 462 U.S. 367, 380 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 421-23 (1988). None of these factors is present here. For more than 25 years, the Supreme Court has recognized the right of prisoners in federal custody to bring *Bivens* actions when their constitutional rights are violated by their jailers. *See Carlson v. Green*, 446 U.S. 14, 18 (1980); *McCarthy*, 503 U.S. at 150. This Court has also recognized the propriety of *Bivens* actions by civilians against military officers. *See Saucier v. Katz*, 533 U.S. 194, 216 (2001).

Contrary to the circuit court's footnote comment, this case is nothing like *Sanchez-Espinoza*, which dealt with the legality of the policy decision to fund the Nicaraguan contras. This action is not about the correctness of the United States' invasion of Afghanistan and does not implicate foreign policy or

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[1] The government cites no Supreme Court rule or decisional authority, and our research discloses none, holding that the Court is precluded from granting the writ because an alternative ground for the decision below is not presented in a separate question on which certiorari is requested.

methods of war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (distinguishing between acts committed "on the battlefield" and continuing detention outside war zone) (plurality). Indeed, in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), this Court recognized that challenges to detentions at Guantánamo do not implicate "concerns about military discipline." *Id.* at 586. The sole issue here is whether torture is a permissible instrument of interrogation of non-enemy combatants detained at Guantánamo.

The policies behind *Bivens*, moreover, strongly favor recognition of Petitioners' claims. Petitioners have been released, so declaratory or injunctive relief would be meaningless. For Petitioners here, like the plaintiff in *Bivens*, it is "damages or nothing." *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Bivens v. Six Unknown Agents*, 403 U.S. 308, 410 (1971) (Harlan, J., concurring). Respondents' argument, made below, that recognizing a *Bivens* action would "increase the likelihood that officials will make decisions based on fear of litigation rather than appropriate military policy" is specious. To the extent that potential civil liability would effectively deter military and cabinet officers from ordering and approving torture, that is entirely salutary. *Butz v. Economou*, 438 U.S. 478, 505 (1978). Torturers should fear litigation.

Respondents' argument that special factors preclude allowing a *Bivens* action for torture of detainees also flies in the face of express U.S. treaty obligations that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." U.N. Convention Against Torture, Art. 2, pt. 2; *see also* State Dept. Report to the Committee Against Tor-

ture, Feb. 9, 2000, at ¶ 100 ("Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer."). If special factors preclude a cause of action for torture, the strictures of the Torture Convention are rendered essentially meaningless.

Respondents' argument for deference given the "sensitive circumstances" of Guantánamo has already been rejected by eight Justices of this Court in *Hamdi*. As Justice O'Connor wrote for the plurality, "whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536 The analyses in the other *Hamdi* opinions – Justices Souter and Ginsberg (concurring) and Justices Scalia and Stevens (dissenting) – reflect the implicit agreement of at least eight justices that the separation of powers doctrine does not circumscribe the Court's power to review the Executive's actions in the treatment of purported "enemy combatants." As this Court has stated, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit," and, further, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *accord Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). Invoking the vapid generality of "sensitive circumstances," the government tries to do precisely this, arguing that torture at Guantánamo does not come within judicial purview.

II. THE CIRCUIT COURT'S REFUSAL TO CONSIDER THE IMPACT OF *BOUMEDIENE* AND ITS DISPOSITION BASED ON QUALIFIED IMMUNITY ARE PRECISELY THE ISSUES THAT THIS COURT SHOULD REVIEW.

Like the court below, Respondents are eager to avoid a definitive answer to the core constitutional issue presented in this case: whether Guantánamo detainees have a due process right not to be tortured. Thus they support the disposition below on qualified immunity grounds. They argue that the circuit court "expressly exercised" the discretion granted in *Pearson v. Callahan*, 129 S. Ct. 808 (2009). But the opposition, like the circuit court's opinion, makes no attempt to conduct the required analysis of the factors identified in *Pearson* in favor of and against avoidance of the constitutional issue. Had the court properly applied the analysis required by *Pearson*, the need to address the constitutional issue first would have been shown to be paramount.

This is not a case where the issues are so "fact-bound that the decision provides little guidance for future cases." *Pearson*, 129 S. Ct. at 819. To the contrary, it is essential that this Court lay down a strong and clear message that officially ordered torture is abhorrent and always a violation of fundamental rights. Without this Court's guidance, the court of appeals' studied indifference to the torture of Guantánamo detainees remains the final word on the issue and, indeed, could provide further cover for a claim of qualified immunity in the future in the unfortunate event that the specter of torture recurs. *Pearson* makes clear that the *Saucier v. Katz* sequence is "especially valuable with respect to

questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* at 818. Here the issue of official torture will always be bound up with the issue of potential immunity by the relevant officials and it is essential that the core constitutional value be affirmed so that future torturers cannot claim confusion as to whether they can torture detainees in their custody.

On the merits, Respondents duly recite the familiar litany of cases which, notwithstanding this Court's ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the circuit court continues to insist precludes any enforceable constitutional rights for those held in U.S. custody outside this country's borders: *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Zadvydas v. Davis*, 533 U.S. 678 (2001). In the absence of certiorari in the instant case, the court of appeals will add this case to that list. Despite this Court's clear guidance as to the meaning of these cases in light of the flexible analysis required by the *Insular Cases*, the court of appeals continues to base its decisions on an analytic framework that this Court has repudiated. The Solicitor General, too, continues to argue for that repudiated analysis. It falls to this Court to make clear that the right not to be tortured, like the right to habeas, is fundamental and fits readily within the *Insular Cases* framework.

It is noteworthy that Respondents make no response to the contention that qualified immunity is grounded in good faith and that the conduct of these officials – who actively searched for a location and for legal doctrines that would render their "otherwise criminal [conduct] *not* unlawful" (App. 170a) – cannot possibly be deemed to have been in good faith. In the

typical qualified immunity case, the issue is whether the right invoked was so "clearly established" that a "reasonable officer" would know that his conduct violated that right. *Katz*, 533 U.S. at 202. Here, Respondents exhaustively tried to probe the constitutional margins and intentionally tried to turn the "clearly established" standard to their own advantage. Knowing their conduct violated federal law, the military code of conduct, international conventions, and criminal law, they searched for an area of purported constitutional uncertainty that would shield them from any due process claim by their detainee victims. This is the epitome of bad faith, and it precludes any invocation of qualified immunity. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The calculated misuse of qualified immunity to shelter knowingly unlawful conduct is another issue that this Court should address and repudiate.

III. THE CIRCUIT COURT'S REJECTION OF PETITIONERS' CLAIMS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT SUFFERS THE SAME DEFECTS AS ITS *BIVENS* CLAIM REJECTION.

As with the *Bivens* claims, with respect to the RFRA claims, Respondents bypass the threshold question whether Petitioners are entitled to RFRA protection and focus their opposition on whether the Respondents may invoke qualified immunity. (Opp'n at 19-20.) For its part, the court of appeals relied on qualified immunity, in a one-sentence footnote, only as an alternative ground for decision. (Op. at 11 n.6.) The court's footnote offered no analysis but merely referred to Judge Brown's concurring opinion in its earlier opinion, which, in turn, offered no real analy-

sis and even noted that there is reason to question whether qualified immunity is an available defense under RFRA. (Op. at 10 n.5.) There is no basis to assert that a reasonable official would conclude that detainees were not "persons" for purposes of RFRA.

According to Respondents, RFRA does not clearly establish what "persons" means because the word is undefined and there is no statutory language expressly extending it to include aliens outside this country's geographic boundaries. Respondents have nothing to say about application of fundamental canons of statutory construction, such as interpreting undefined words in accordance with their ordinary and natural meaning, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), and not implying an exception in a statute unless its absence would lead to an absurd result, *United States v. Rutherford*, 442 U.S. 544, 555 (1979). In Respondents' and the circuit court's dictionary, what Congress *really* meant by "person's exercise of religion" was: citizens and resident aliens, but *not* aliens under complete U.S. control but beyond its borders, who are engaging in conduct that this Court had previously recognized in the period from 1963 to 1990 as protected under the First Amendment. In support, Respondents focus on one of RFRA's stated purposes – "to restore the compelling interest test as set forth in *Sherbert*," 42 U.S.C. § 2000bb(b)(1) (2009) – while ignoring its additional explicit purpose – "to provide a claim or defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b)(2) (2009). Respondents simply assume that "religious exercise" is confined to First Amendment jurisprudence, when there is nothing on the face of the statute that so specifies, when the statute says otherwise, and when this Court has ruled precisely

the contrary. In *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), the Court declared RFRA unconstitutional as applied to state and local government action because "RFRA is not so confined" to enforcement of recognized First Amendment guarantees against the states through the Fourteenth Amendment. The statute inarguably extends far more broadly than to recognized Free Exercise rights.[2]

Moreover, the notion that Respondents in good faith could have reasonably gone through the interpretative machinations the government has constructed such that they would be lulled into believing that throwing Petitioners' Korans into a filthy toilet would not be a RFRA infraction is ridiculous. Perhaps this explains why the court of appeals did not even try to explain its invocation of qualified immunity in respect to RFRA.

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[2] As noted in the Petition, the Solicitor General's assertion here is exactly contrary to the government's submission to this Court in *City of Boerne v. Flores*. (Pet. For Cert. at 22 n.5.)

CONCLUSION

This case cries out for review by this Court. There can be no ambiguity or confusion about the right not to be tortured by U.S. government officials or that Guantánamo detainees are persons who those officials cannot humiliate in practicing their religion. Respondents seek to leave the law unsettled and to pull a cloak of immunity, now and in the future, over government torturers. Our constitutional order, the rule of law, and the human decency which is left to this Court to uphold require that this Court reverse the decision of the court of appeals. Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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